PETROLEUM TANK RELEASE COMPENSATION BOARD
MINUTES
Business Meeting
July 18, 2005
Department of Environmental Quality
Metcalf Building Room 111, 1520 East 6th Avenue
Helena, MT

Members in attendance were Tom Bateridge, Greg Cross, Roger Noble, Shaun Peterson, and Frank Schumacher. Also in attendance were Terry Wadsworth, Executive Director and Paul Johnson, Board attorney.

At 10:00 Mr. Wadsworth informed the members present that terms of office of the previous Chair and Vice-Chair, Mr. Johnston and Mr. Manson, expired on June 30, 2005, leaving those positions vacant. By rule elections are held in October of each year, requiring the election of an interim Chair and Vice Chair at this meeting.

Mr. Schumacher moved that Greg Cross be elected Chair. Mr. Noble seconded. **The motion was unanimously approved**.

Presiding Officer Cross nominated Frank Schumacher as Vice-Chair. Mr. Bateridge seconded. **The motion was unanimously approved.**

Approval of Minutes

Mr. Schumacher moved to approve the minutes as written. Mr. Noble seconded. Mr. Peterson and Mr. Cross abstained from the vote. **The minutes were approved as written by three votes with two abstentions.**

Approval Executive Session Topics

Mr. Schumacher moved to accept the contract with Doney, Crowley, Bloomquist, Payne & Uda with regard to the subrogation program, as proposed in Executive Session. Mr. Peterson seconded. **The motion was unanimously approved**.

Eligibility – Tribal Express – FacID #43-13620, Rel #4336, Poplar

Mr. Wadsworth introduced the eligibility issue regarding Release #4336 (Tribal Express). The facility is located on Tribal land. He summarized the bases for Board staff's recommendation that the release be determined ineligible: (1) There was no agreement between the Tribe(s) and the State at the time the release occurred; and (2) Violations were found of federal codes that were functionally equivalent to the laws and rules the Board has determined are applicable to eligibility. The release was discovered during a federal inspection conducted on March 31, 2004.

Ryan Rusche, Reservation attorney and counsel to the Assiniboine and Sioux Tribes on the Reservation, and General Counsel to Fort Peck Incorporated, addressed the Board. The Tribes own the Tribal Express convenience store. Approximately two and a half years ago, the Tribes formed Fort Pack Incorporated and gave it the responsibility of operating Tribal Express. As with all entities created by the Tribes, Tribal Express and Fort Peck Incorporated were created not only to generate revenue, but also to create businesses that are owned by the Tribe and promote economic development within the Reservation. Since its creation, Tribal Express has had difficulty obtaining management capable of carrying out those purposes that are different from just running a business.

The Tribe-State agreement expired by its own terms on March 3,2004. Among the provisions of the Agreement was that the state notify the Tribes of changes in State law or regulation, and meet with the Tribes to determine whether the Tribes' ordinances and regulations coordinate with the State's so that the laws and rules can be substantially similar. The March 31, 2004 inspection occurred almost a month after the Agreement expired. While it was discovered on that date, there is no evidence of when the spill actually occurred. Therefore, it is difficult to say that there was no agreement at the time the spill occurred, since it is not clear when it occurred.

Mr. Rusche addressed the violations of federal regulations, and corresponding Administrative Rules of Montana (ARM). He indicated that the Tribes were cited for failure to have the cathodic protection on the tanks inspected every three years. According to Tribal records, that inspection was not due until August 2004, while the EPA inspection was conducted in

March 2004. With regard to the violations concerning recordkeeping, he stated that, as a result of a federal investigation of previous management of the store, unrelated to the tank system, federal authorities with the Office of the Inspector General (OIG) had seized the records of the store, and they were not available at the time of the inspection. The EPA inspection report states that only two records pertaining to the tank system were found at the OIG office in Billings. There is no chain of custody of the records and no listing of what records were seized. The Tribes have not had access to those records for two years, and do not feel it is appropriate to rely on the statement in the EPA report concerning what documents exist.

Mr. Rusche then addressed the failure to report a suspected release within 24 hours and the failure to initiate an investigation within 7 days of a suspected release. He stated that the release was not suspected until it was discovered during the inspection and was reported immediately thereafter, and an investigation was begun immediately upon discovery of the release.

With respect to those violations concerning operation and monitoring of the tank system and the automatic tank gauge (ATG), the manager in charge of the store was terminated for various failures, but during his tenure the ATG was altered, disabled and shut off, and was, therefore, not operational so none of the reports that would have indicated a problem were generated. Once that situation was realized, it was remedied. It is difficult to remain in compliance when an employee maliciously or deliberately shuts off a system. In summary, there was no intent to become out of compliance, and once the non-compliance was discovered, action was taken to correct it. He asked that the Board interpret the Tribes' intent broadly and give deference to the relationship the parties intended to form when they signed a Tribal-State agreement.

Mr. Cross commented that, while he is sympathetic to the Tribes' difficulties, the Board has finite resources, and must limit liability based on the rules the Board has developed.

Mr. Peterson feels that, while Mr. Rusche made some good points concerning the financial and maintenance records and discovery of the release by the inspector, the Tribes don't have any excuses for the violations other than a bad manager or mismanagement. The Board cannot set the precedent of finding the site eligible on those bases, because that could happen every time. The fund was established to assist when, despite following the rules, a release occurs.

Mr. Rusche reiterated that Tribal Express acknowledges there are problems, but t is more than just a profit center. It exists to provide services in an area where such services are otherwise unavailable, such as groceries, gasoline, and employment. The Tribes feel that, if nothing else, they should be allowed to finalize their investigation of what occurred with the ATG to determine if there may be criminal or civil liability against which the Board would be able to subrogate, in the event the Board awards eligibility.

Mr. Peterson indicated that the Board does not have much leeway in this decision, and asked Mr. Wadsworth if the Board's determination, whatever it may be, can be appealed.

Mr. Wadsworth stated that any decision by the Board can be appealed. In addition, the Board could table the matter until a later time, allowing the Tribes to bring other information to the Board later. .

Mr. Bateridge asked Mr. Rusche if there is an ongoing investigation into the matter, and when further information might be available.

Mr. Rusche responded that both the Tribes and the Corporation are investigating the matter. He projected at least a few months, in part because vital records are in the possession of the federal government and the Tribes have made multiple requests for their return, with no result.

Mr. Cross stated that the disabling of the ATG eliminated the daily alarm system that would indicate that something was happening. The failure to have annual tightness tests indicates a failure to have any kind of required review of the equipment. The errors by Tribal Express indicate a lack of understanding of what is required. He noted that there are associations that assist owners/operators with putting the proper procedures and inspections in place. He indicated that if an owner invests in some of the best equipment made, the remaining piece is the proper inspection and monitoring procedures. While the Board's options are limited in the matter, it is the desire of the Board that Tribal Express be able to operate successfully.

Mr. Peterson moved to accept the Board staff's recommendation to deny the release eligibility. Mr. Schumacher seconded. **The motion was unanimously approved.**

Eligibility - Mary Hightower Property – Fac ID #56-14109, Rel. #4274, Silver Gate

Mr. Wadsworth stated that Ms. Hightower's attorney had asked that the matter be tabled until the September meeting. The matter was tabled by the Presiding Officer.

Eligibility – Rocky Mountain Supply – Fac ID #56-13286, Rel. #4379, Ennis

Mr. Wadsworth gave a summary of the Board staff's position. There are four issues involved, all of which begin with 75-11-308, MCA (the Board's eligibility statute), and ARM 17.58.326 that point to various rules: (1) the 24-hour rule violation (ARM 17.56 Chapter 5); (2) insuring that the volume available in the tank can contain the volume of fuel to be transferred (ARM 17.56.301 and Uniform Fire Code 7904.6.3.6) – neither the deliverer nor the owner confirmed that there was sufficient volume available in the tank to store the amount of fuel being delivered; (3) constant monitoring of the transfer (UFC 7904.6.3.2) – there must be someone watching the transfer into the tank; and (4) presence and use of an overfill prevention system (UFC 7902.6.5.3) – there must be a spill and overfill prevention mechanism that will either slow the fill rate or stop filling, or sound an alarm – the staff does not have enough information to know whether the alarm sounded and was ignored, or the mechanism was not in place.

Doug Klotther, General Manager of Rocky Mountain Supply, addressed the Board. He requested that the Board overrule the staff's recommendation to deny eligibility. After stating that the spill and overfill protection system was in place and was working properly, he summarized the events that led to the release. On November 17, 2004 the driver, who had 15 years of experience with Rocky Mountain Supply, delivered to the Ennis location. In violation of company policy, he did not confirm the tank readings, and he left the truck during the fill and was inside the building when the alarm went off. As a result he did not hear the alarm, and 300 gallons of fuel spilled. As soon as he discovered the spill he worked to contain and clean it up. In addition, the driver knew of the 24-hour notice requirement, and did not notify anyone of the release until November 19th, when he told Jason Rorabaugh, Petroleum Manager for Operations. Mr. Rorabaugh notified DEQ of the release on the afternoon of the 19th. In addition, the soils were excavated and placed on a non-permeable surface to prevent leaching into the groundwater. Rocky Mountain Supply assumed the release would be eligible for the Fund and knew that the excavation costs might be rejected. Rocky Mountain Supply terminated the driver's employment. While DEQ was not notified of the spill within 24 hours of its occurrence, Rocky Mountain Supply management did notify DEQ immediately upon becoming informed of the matter. Rocky Mountain Supply has been a good steward and 48 hours is consistent with other rulings of eligibility by staff and the Board in prior instances. The issue is environmental cleanup. In addition, he contended that if the driver had been an employee of a delivery company, rather than by Rocky Mountain Supply, the release would be eligible. He also believes that the costs for remediation of the site will not exceed the $17,500 co-pay.

In response to a question from Mr. Peterson regarding cleanup costs, Mr. Klotther indicated that approximately $8,000 has been expended to date and the site is almost cleaned up.

Presiding Officer Cross asked how the overfill occurred if the spill prevention system was in place.

Mr. Rorabaugh stated that the driver used a non-tight fitting. The electronic monitor and alarm system did activate. The tank filled and sealed off, then the spill came from the truck onto the ground.

Ronna Alexander addressed the Board and provided a history of the 24-hour rule. When the eligibility requirements of the statute were originally drafted one of them was that the Department be notified in the manner and within the time provided by law or rule. Over the years, it became clear that statement was being used as a club to deny eligibility, when most of the time the failure to report within 24 hours instead of 36 hours or 48 hours had nothing to do with why the release occurred, how significant or bad the release was, or how the owner dealt with cleanup. The Board did not want to be required to deny eligibility when the 24-hour rule was the only disqualifying factor. The 24-hour rule was not deemed to be part of prevention and mitigation. During the 2003 legislature, the language was removed from the statute by HB 368. This gave the Board the opportunity to look at releases independently to determine if the 24-hour rule had anything to do with creating the leak or preventing cleanup. The bill took effect in October 2003. She gave examples of two releases with 24-hour rule violations that have been determined eligible since October 2003; a site in Thompson Falls and a site in Townsend. During one of these deliberations there was a discussion of the harshness of the penalty with the 24-hour rule. If the Board wants to use that rule to deny eligibility, changes may be necessary. In this case the 24–hour violation has nothing to do with the severity of the release or the cleanup effort. The third example she gave involved a release in Dillon.

Ronna, and the Petroleum Marketers Association, would like something on the record that reaffirms that the 24-hour violation is not going to be used as a club. The legislative record indicates that the Legislature did not intend for the rule to be a hammer either.

On the overfill issue, if Rocky Mountain Supply had brought the fuel in from another company, there would be no discussion. The release would be eligible. The fact that it was their own driver who caused the release makes it less clear.

Recently the Board has made two decisions to make residential tanks eligible. The statute states clearly that residential tanks should not be covered by the fund, and she stated that the Board wiggled and jiggled to make them eligible. The Board has deviated from the way it has handled these cases in the past by finding them eligible, and that precedent will make it hard to find Rocky Mountain Supply ineligible.

Mr. Bateridge asked if the difficulty in the three cases cited was that it was unclear there had been a release.

Ronna replied that they each had a release, but were not sure whether there was contamination.

Paul Johnson, the Board's attorney, commented that the Board granted eligibility in two of the cited examples on the theory that a release had not been confirmed until lab results had come back, justifying abrogation of the 24-hour rule because once the lab results had confirmed a release, DEQ was notified within 24-hours of that confirmation. In the Dillon case, the Board upheld the staff recommendation of non-eligibility based on 24-hour notice violation, the case has been appealed and is in front of a hearing examiner. This illustrates the need for the Board to be consistent in their application of the rule.

With respect to the residential tanks, he stated that he resents the implication that the Board wiggled and jiggled the rules to reach a result in those cases. One of the cases involved the Ruth Graham property. The staff and counsel completed a careful, cautious and difficult legal analysis, with respect to both cases and recommended the releases be eligible.

Mr. Schumacher asked for confirmation of his understanding that in the Dillon matter cited by Ms. Alexander, the fact situation involved the activation of several alarms repeatedly over the course of four or five days, giving multiple warnings of possible leaks. In addition, an inspection of the containment system had yielded fuel in the sumps, and yet the suspected release was not reported.

Mr. Johnson confirmed that, in the Dillon matter, the first alarm sounded approximately two days before the inspection occurred, and the release was not called in until a couple of days after the inspection. In addition, there were inventory reports that indicated a significant loss of product.

Mr. Wadsworth stated in that matter, the fact that the owner/operator did not provide notification of an unusual operating condition was the basis of the violation. Prior Board discussions have also addressed notification of a suspected release, notification of an actual release and how one determines whether or not an actual release has occurred, which sometimes cannot be determined until lab results are received
Mr. Schumacher asked for clarification of the evidence presented on the spill and overfill protection.

Mr. Wadsworth stated that, in this case, it appears the alarms did go off, so equipment was in place, and the release to the environment was minimized by having the equipment functioning. With respect to the 24-hour rule discussions, the requirement is no longer in the statute, but it is still in the rule. With respect to the other two violations, the driver did walk away from the truck and the owner was not watching either. The Board rules require that the process be monitored constantly. In addition, neither the driver nor the owner stuck the tank, or took another electronic reading to confirm the volume available to be filled. They clearly violated those two requirements.

Ms. Alexander stated, for clarification, that the reason the 24-hour rule was removed from statute was so the Board would not have to use it as a qualifying factor. It was not intended to say there should be zero release reporting, but taking the requirement out of statute removed the hammer that held the Board to that standard.

Presiding Officer Cross asked for clarification of when the driver notified Rocky Mountain Supply of the spill, and if the manager knew how big the leak was.

Mr. Klotther stated that the release happened at noon on November 17, and the driver told his supervisor on November 19 at 8:00 a.m. In addition, the driver told the store manager that he would take care of it. The driver violated procedures by not calling the spill in immediately, and by not sticking the tank.

Presiding Officer Cross asked whether management was notified of the spill before or after the dirt was picked up and moved away.

Mr. Rorabaugh called the Department at about noon, and called Resource Technologies to do the soil removal in the afternoon. Excavation began on the following Wednesday. There has been no additional work requested by DEQ at this point.

Mr. Bateridge moved to approve the staff recommendation to deny eligibility. Mr. Noble seconded. Mr. Bateridge and Mr. Noble voted to approve the motion. Mr.Peterson, Mr. Schumacher and Mr. Cross voted to oppose the motion. **The motion failed.**

Mr. Peterson moved to grant eligibility to the release. Mr. Schumacher seconded. Mr. Peterson, Mr. Schumacher and Mr. Cross voted to approve the motion. Mr. Bateridge and Mr. Noble voted to oppose the motion. **The motion carried.**

Mr. Peterson stated his reasons for moving to grant eligibility to the release for the record, as follows. The fund is here to protect the public's interest and take care of spills and also the marketers that are out there. With respect to the 24-hour rule, the law says the owner should provide notification, and in this particular case it was the employee who didn't notify the owner in a timely fashion. The owner was being penalized for the actions of an employee. Ronna Alexander's comments that the 24-hour rule isn't necessarily a hard and fast rule made sense to him. As well, violation of the 24-hour rule did not impact the cost of the claims. The other issue involved whether the owner had the right over-fill equipment. The owner clearly showed that they did.

Ms. Alexander reiterated her statement that the Legislative intent was to remove the 24-hour rule from statute so the Board could apply it in a discretionary manner to those sites where failure to report within 24 hours did not exacerbate the problem.

Presiding Officer Cross stated that he concurred in Ms. Alexander's statement. He was the tie breaking vote in the matter and voted with respect to what he feels was the legislative intent in the matter.

Sinclair Oil Company – Reimbursement of Cleanup Costs, Claim #20041112-N, FacID #07-02088, Rel #3442, Great Falls

Mr. Wadsworth provided the Board a summary of the events concerning this claim. The matter concerns excavation of soils at a Sinclair Oil Corporation site in Great Falls and whether the claim was filed in accordance with the requirements of 75-11-309(1)(f) MCA and whether the soil removal costs were actual, reasonable and necessary, as required by 75-11-309(1)(f)(ii), and (2)(a)(ii), MCA. The matter was first brought to the Board's attention at the March 21, 2005 meeting. The original tank removal work plan called for removal of 200 yd^3 of soil. While the consultant was on site it became clear that additional soil needed to be removed. A Form 8-Corrective Action Plan Modification for soil removal totaling 2000 yd^3, along with other work, was faxed to the staff in the late afternoon, with a request that the modification be reviewed as soon as possible. The staff reviewed and approved the modification the following morning. The work was completed, a claim submitted to PTRCB by Olympus, and payment made to the consultant. Olympus Technical Services was the consultant on the site, RAM Environmental was the subcontractor that got the bid for the tank removal and removal of 200 yards of soil, and Shumaker Trucking & Excavating was RAM's subcontractor for excavation and removal of the soil.

After payment was made a question was raised about the reasonableness of the charges for excavation and disposal of the soils. The staff investigated the issue, reviewing the files in greater detail and securing additional information from Olympus Technical Services and Shumaker Trucking. A formal request for information was sent to Sinclair Oil Corporation and a response received. When the claim was reviewed in more detail, the staff noticed that several unit prices and the totals charged had been blacked out on the Shumaker Trucking invoice RAM Environmental submitted. A clean copy of the invoice was secured from Shumaker, showing those prices and totals. An analysis of the invoices showed that RAM Environmental had charged Sinclair $8.50 per yard to load the impacted soils and $24.00 per yard for transport and disposal of the soils. Shumaker Trucking had charged RAM $2.50 per yard to load the impacted soils, and $17.00 per yard for transport and disposal of the soils, giving RAM a volume discount because the amount of soils to be excavated and removed was 2000 yards, rather than 200. The total difference between the Shumaker Trucking invoice to RAM Environmental and the RAM Environmental invoice to Sinclair was $32,000. That markup is more than the 7% markup allowed by the Board's rules. The Board approved reimbursement of the entire RAM invoice.

Mr. Peterson asked if this was a bidded contract and if the plan was approved. If so, why is the Board reviewing the matter now?

Mr. Wadsworth responded that the tank removal and soil excavation was bid at approximately 200 yards. The staff reviewed the plan and, at 200 yards, agreed with the costs and approved the plan. While the tank was being removed, the consultant discovered that much more soil was impacted than had been anticipated. 2000 yards were ultimately removed.

Mr. Wadsworth feels that it is debatable whether the bid is relevant when the volume of soil to be removed increases tenfold. The bid was for 200 yards, not 2000 yards. The staff anticipated that the consultant would pass through any savings to the Fund. Consultants have always told the PTRCB that they try to save the Fund money. In addition, the consultants are required to provide documentation that costs are actual, reasonable and necessary. With those expectations in mind, the staff authorized the modification to the work plan expeditiously. Based on past practices, past involvement with other consultants, and the staff's expectations of what would need to be provided to the Board, the staff, on behalf of the Board, authorized the consultants to move forward with the additional work.

Mr. Wadsworth stated that, since this incident has occurred, he has changed the way the staff addresses emergency work plan modifications in the field. After reviewing other, similar, emergency changes to work plans, it appears the failure to pass savings on to the Fund has not happened before. Since it now appears there are consultants who will not pass savings on to the Fund, the staff will change the way it authorizes work. Form this point forward, consultants will be required to include prices for various levels of excavation, e.g. 200, 500, 1000, 1500 and 2000 yards. If work gets beyond the bidded price, the staff will not authorize the work.

Because the staff authorized costs for the work on behalf of the Board, Mr. Wadsworth is not encouraging the Board to pursue the matter. The matter had been brought to the Board's attention because the staff felt the Board may want to try to recover the $32,000 difference, given unreasonableness. In addition, the staff is changing its procedures in an attempt to insure that this type of situation does not arise in the future.

Presiding Officer Cross commented that in his view over-excavating makes more sense in the long-run than closing a tank basin and waiting for approval to do additional work. That being said, the consultants should have the best interest of the environment and the population at heart. However, if a consultant is awarded a contract as the low bidder, and he comes in under his own bid, typically that is a windfall to him and he keeps it. In the current situation, where work plans have been reviewed and approved by the Board staff, there must be some way to control accelerating costs. He asked how the situation could have been prevented to begin with.

Mr. Wadsworth reiterated his current scaled bid procedure, and stated that he expects to see volume discount savings reflected in the bids. As a result, it may not always be the lowest bidder who wins the contract, but the one with the lowest cost risk.

Presiding Officer Cross asked if the site had been cleaned. If the dig out succeeded in cleaning up the site, the extra $32,000 may have been well spent. He asked if a status report could be brought to the September meeting.

Presiding Officer Cross said no motion was needed

Claim Adjustment, Claim #20050331F, FacID #16-08721, Rel. #4160, Town Pump Three Forks

Mr. Wadsworth stated that RAM Environmental asked to have this matter tabled and postponed to the September meeting. The matter was tabled.

Eligibility Ratification

Mr. Wadsworth informed the Board of the eligibility applications before the Board. (See table below). He noted that the Board had voted to grant eligibility to Rocky Mountain Supply earlier in the meeting. In addition, the Hightower property eligibility has been tabled until September, and the Tribal Express release was determined ineligible earlier in the meeting.

Mr. Peterson moved to ratify the eligibility determinations contained in the eligibility table, with the corrections noted. Mr. Schumacher seconded. **The motion was unanimously approved.**

Board Staff Recommendations Pertaining to Eligibility From May 10, 2005 thru July 5, 2005				
Location	Site Name	Facility ID #	DEQ Release # Release Year	Eligibility Determination – Staff Recommendation Date
Poplar	Tribal Express	43-13620	4336 May 2004	Ineligible – No Agreement in place and Functional equivalency violations. 5/17/05 – **APPEALED 6/16/05 – INELIGIBLE**

Location	Site Name	Facility ID #	DEQ Release # Release Year	Eligibility Determination – Staff Recommendation Date
Valier	Ben Taylor, Inc	37-10231	4383 Dec 2004	Eligible – No violation noted. 6/2/05
Silver Gate	Hightower property	56-14109	4274 Sept 2003	Ineligible – No indication of spill, overfill, corrosion, release prevention on tanks or piping. 6/10/05- **APPEALED 6/29/05 - TABLED UNTIL SEPT. MTG**
Ennis	Rocky Mountain Supply, Inc	56-13826	4379 Nov 2004	Ineligible – Overfill by delivery vehicle. Multiple violations. 6/14/05 **APPEALED 6/28/05 - ELIGIBLE**
Lolo	Ole's #14	32-05215	4388 Jan 2005	Eligible – No reported violations. 6/14/05
Great Falls	Double Barrel Cafe	99-95004	4403 April 2005	Eligible – No reported violations. Tanks were removed 1980's. 6/17/05

Claims over $25,000

Mr. Wadsworth presented the Board with the claims for amounts greater than $25,000 since the last Board meeting. (See table below). There were two claims totaling $178,522.43. Mr. Schumacher moved to approve the claims over $25,000. Mr. Bateridge seconded. **The motion was unanimously approved.**

Location	Facility Name	Facility ID#	Claim #	Claimed Amount	Reimbursed
Great Falls	Holiday Exxon	70-00619	20050223D	$109,103.63	$91,603.63 Co-payment met with this claim
Shelby	Simons Petroleum	51-04030	20050510E	$104,457.84	$86,918.80 Co-payment met with this claim
Total					**$178,522.43**

Weekly Reimbursements

Mr. Wadsworth presented the Board with the summary of weekly claim reimbursements for the week of May 18, 2005 through the week of June 29, 2005 for Board ratification. (See table below). There were 262 claims, totaling $803,278.27. Mr. Wadsworth noted that there are four claims with zero reimbursement in the packet: one for Ennis Office Park, three for various Town Pump sites (two claims withdrawn by owner, one for a duplicate invoice).

Mr. Schumacher noted that there were multiple claims for $24,000 submitted by the same company on the same day.

Mr. Wadsworth acknowledged that fact. The Board has authorized the staff to pay any claim under $25,000, with the Board ratifying those payments at the next Board meeting. There are some claimants who will submit claims for less than $25,000 so the Board will not need to review them, and they can be paid more quickly. The Board only meets every six to eight weeks, and claims over $25,000 have to wait for the next Board meeting. There have been discussions about removing the $25,000 limit and allowing the staff to process those claims without Board approval. There has also been talk of converting claims to claim-by-task, meaning that a task must be completed before submission of a claim.

Mr. Schumacher asked if the Board is accomplishing anything by the $25,000 limit requirement.

Mr. Wadsworth stated the only way he sees for the Board to remain involved in those activities above $25,000 is to implement a pay-by-task system, paying only for completed tasks. He explained how the pay-by-task system should work for activities including those above $25,000, and help to reduce costs by allowing better tracking of costs. He used preparation of the various reports that must be filed as an example. In many cases, the current system involves a

consultant writing a report over a period of several months, allowing invoicing of a few hours each month. Tracking the number of hours required to write a report, and comparing that number to the number of hours approved for writing the report is time consuming and difficult for the staff.

Mr. Schumacher asked Mr. Noble his thoughts on the subject, since he is an environmental consultant.

Mr. Noble stated that he feels a task-by-task system is a better system.

Mr. Wadsworth reminded the Board that the Legislative Audit Committee had instructed the Board to develop tasks and costs-by-task. As well, the Board instituted a 7% markup that consultants could apply to a particular activity, intended to cover some of the operating costs for those who have to wait for six or eight weeks for payment. What has happened is that consultants are getting paid in a timely fashion, and still applying for the 7% markup, thus taking advantage of the system. A pay-by-task system will make the 7% markup work the way it was intended to work. One objective in task development was to keep the tasks relatively small.

Mr. Cross noted that the claims contained in this set of weekly reimbursements that are the source of this discussion total roughly $250,000. That amount would be difficult for any contractor to hold until the Board can review the claims.

Mr. Wadsworth indicated that the 7% markup is intended to assist those companies who need it.

Mr. Wadsworth asked if the Board wants to put pay-by-task on the agenda for the September meeting. The Presiding Officer indicated the desire to do so.

Mr. Noble noted the 7% markup applies to the contractor or consultant, not the subcontractor. Mr. Wadsworth clarified that, since the Fund is a reimbursement program, a consultant cannot be paid for a claim until the consultant can show that he has made payment to the subcontractor. The original intent of the 7% was to cover the cost of a bank loan, should that be necessary for a consultant to pay his subcontractors.

Mr. Noble moved to ratify the weekly claim reimbursements. Mr. Peterson seconded. **The motion was unanimously approved.**

WEEKLY CLAIM REIMBURSEMENTS
July 18, 2005 BOARD MEETING

Week of	Number of Claims	Funds Reimbursed
May 18, 2005	11	$86,015.42
May 25, 2005	12	$104,007.42
June 1, 2005	13	$100,784.83
June 8, 2005	50	$101,781.68
June 15, 2005	50	$117,101.15
June 22, 2005	38	$98,319.11
June 29, 2005	88	$195,268.66
Total	**262**	**$803,278.27**

Former Holiday StationStore #267 – FacID #07-08065, Great Falls

Mr. Wadsworth presented this discussion item to clarify the Board's obligation and degree of responsibility, and to determine its desired role in the matter. The Board's rules (ARM 17.58.337) require owners and operators to notify the Board, within one week, of any suits for damages resulting from a release, and whether an insurer is defending him. Those rules were promulgated, under authority of 75-11-309, MCA and 75-11-318, MCA, to allow the Board to be notified in a timely manner sufficient to allow the Board to monitor or participate in actions and negotiations that may result in reimbursements from the Fund. Holiday StationStore was served with a summons and action for damages on November 7, 2003. The Board was first notified of the lawsuit by letter dated May 18, 2005, received on May 24, 2005.

Mr. Andy Brown, attorney for Rocky Mountain Oil Inc. (Rocky Mountain), d/b/a Holiday StationStores, Inc., addressed the Board and introduced Glen Anderson, Vice President, and Bruce Anthony, Environmental Director. He provided a summary of the history of the site involved in the suit. The store has been opened since the early 1960's and was

acquired by Rocky Mountain in November 1992. In 1995 the Montana Department of Transportation discovered contamination in the right-of-way, down gradient from the store, notified Rocky Mountain, and asked them to participate promptly in a cleanup so the roadwork could continue. Rocky Mountain began the cleanup process in 1995 and in February 1997 applied to the Fund for eligibility for reimbursement of cleanup costs. In 2001 the site was sold and is no longer used as a StationStore. In November 2003 a suit for third-party damages was brought by neighbors of the site. The suit was inactive for approximately a year, becoming more active in early 2005. The matter is still in the discovery stage. While preparing for the litigation, Rocky Mountain interviewed an employee it had inherited from the former owner of the site, SuperAmerica, who stated that tanks were removed from the site in 1985, and there was evidence of a release at that time, including pitting and corrosion of the tanks, water in the tanks and strong odors. Rocky Mountain was unaware of these facts when it applied for and was granted eligibility in 1997. After learning this information, Rocky Mountain reviewed the Board's statute and rules to determine how it will affect the eligibility of the current release, since releases prior to 1989 are not eligible for the Fund. During that review Rocky Mountain learned of the requirement to notify the Board of the suit. As a result, Rocky Mountain provided information to the Board, by letter dated May 18, 2005, information concerning the prior release and the existence of the lawsuit. This is not an action on which any action needs to be taken at this time. There have been no claims for reimbursement of third-party damages as yet. Rocky Mountain proposes that, when a claim is submitted, the Board evaluate at that time whether there has been any harm to the State as a result of Rocky Mountain's late notice

With regard to the discovery date, the information Rocky Mountain had available at the time it submitted its eligibility request did not give it reason to believe there had been a prior release.

Mr. Peterson confirmed with Mr. Wadsworth that the Fund can be responsible for third-party claims.

Mr. Wadsworth state that he is looking for guidance from the Board on how it wishes to address the lawsuit from here forward. What degree of involvement is the Board interested in.

Mr. Brown noted that the suit is moving very slowly because there are multiple parties involved and it is a commingled plume, but there have been settlement negotiations and three parties have settled for a combined total of $85,000. There is a good possibility that the original contamination occurred before Rocky Mountain purchased the property in 1992, and possibly prior to 1989. However, the Board's statute relies on date of discovery, not date of release, to determine eligibility.

Mr. Wadsworth stated that he has not evaluated the situation from a legal standpoint. Questions that may need to be addressed include whether Rocky Mountain's failure to give timely notice of the lawsuit relieves the Board of an obligation to make reimbursement for settlement costs. He recommends that legal counsel evaluate at least that issue.

Presiding Officer Cross asked, if SuperAmerica, the owner prior to Rocky Mountain, is determined to be liable for the damage, is there a mechanism for the Board to recoup the reimbursements provided to Rocky Mountain since it obtained eligibility.

Mr. Wadsworth reminded the Board that when the first release is discovered at a site, and during investigation of the release it is determined that there is historical contamination from prior activity, generally the historical contamination is included in that first release. It would be difficult to separate the earlier contamination from more recent contamination. Even if it can be determined that SuperAmerica is responsible for the contamination, it is still part of the eligible release. In addition, SuperAmerica has also not notified the Board of this suit. He recommends that the Board ask legal counsel to review the current negotiations to get an idea of potential liability for the Fund, and the Board's legal stand on the issue of notification, and to report back to the Board with his recommendations.

Mr. Peterson supported the recommendation to involve legal counsel.

Mr. Johnson asked if the Board is interested in a legal opinion on the rule that requires immediate notification, or does it want a third party reimbursement and actual, reasonable and necessary, or wait for a claim, or does it want both.

Mr. Wadsworth indicated it is his belief that because the Board was not notified in a timely fashion, it is not liable. It would be worth having counsel render an opinion on that matter. In addition, it seems sensible to have counsel look at the negotiating process and how far along it is, and perhaps evaluate how much weight is given to the notification.

Presiding Officer Cross indicated he would like to move forward with legal counsel and will discuss the matter with Mr. Wadsworth .

Mr. Schumacher asked how many parties are left in the lawsuit, since three of them have settled.

Mr. Brown indicated that there are three remaining; Taco Treat, Steve Martin and Thelma Jones.

Mr. Johnson asked whether the kind of damages the plaintiffs are claiming are related to cleaning up their properties.

Mr. Brown indicated that in addition to economic damages, the plaintiffs have raised a Constitutional claim in the case under the provision of the Montana Constitution that guarantees a clean environment. Defendants are addressing those.

Mr. Wadsworth notified the Board that Keith's Country Store is also involved in this lawsuit and has also not notified the Board of its involvement. What the Board chooses to do in this instance will set precedent for Keith's Country Store and their third-party damages.

Mr. Schumacher clarified that the Board is asking legal counsel to evaluate what impact the notification has on the Board's liability, and discuss with Rocky Mountain's counsel where they are in the negotiating process.

Form 8 Modification

Form 8 was modified and has been in use as a draft for some time. Mr. Wadsworth would like to issue it as a final document.

Mr. Noble asked Mr. Wadsworth to send the form out to consultants and solicit their comments before making it a final document.

Mr. Wadsworth will do so and bring the comments to the next Board meeting.

Working Group Report

The focus of the Working Group is to discuss what the Board considers are the laws and rules based on regulated and unregulated systems and statutory changes. Identify those laws and rules the Board wants to have applicable for criteria on eligibility. The current strategy is to develop an initial self-inspection checklist that, for some systems, would become the content for a professional inspection. The objectives of the checklist are to update the rules to current requirements, allow the owner/operator to meet federal fiscal responsibility requirements, identify liabilities to the fund and give owners/operators a clear indication of whether or not they are eligible. The work group has reviewed the checklist and made changes and corrections and is waiting a final draft

Fiscal Report

Mr. Wadsworth presented the Board with the current Fiscal Report. He noted that he expects the Contracted Services year-end balance will be roughly $1000, and the Regular Claim Payments year-end balance to be roughly $15,000. The accrual balance will remain roughly $200,000. He noted that he expects the budget to end the year in the black, with a net worth of approximately $100,000.

Mr. Wadsworth indicated that at the end of the fiscal year the accrual balance is canceled and a a reassessment is done for the new year . Accruals for the 2006 fiscal year will be approximately $668,000. He reminded the Board that the staff is looking at ways to process some of the claims that are suspended for missing information. If a claim is suspended for a missing receipt for a small portion of the claimed amount, the staff may seek the Board's approval to ask the claimant if they wish to withdraw that portion of the claim so that the remainder of the claim can be paid.

He also indicated that the staff received its share of the settlement Allan Payne recently negotiated in the subrogation effort. That payment, approximately $563,000 was received in fiscal year 2006.

Sandi Olsen, Remediation Division Administrator, noted that the DEQ portion of the budget will also show a surplus of about $85,000.

Board Attorney Report

Paul Johnson, attorney for the Board, advised the Board that proposed stipulated findings of facts have been submitted to opposing counsel in the Town Pump-Dillon case (see table). There is limited discovery occurring. The question is mainly one of statutory and rule interpretation. He expects a hearing in the Fall.

Mr. Wadsworth noted that the staff is working with counsel and the Department to have an opinion rendered on the issue of the save clause and applicability clause from the 2003 legislation as they relate to the Isle Oil matter.

Location	Facility	Facility # & Release #	Disputed/ Appointment Date	Status
Boulder	Old Texaco Station	22-11481 Release #03138	Eligibility 11/25/97	Dismissal Pending because cleanup of release completed.
Thompson Falls	Feed and Fuel	45-02633 Release # 03545	Eligibility	Case was stayed on 10/21/99.
Eureka	Town & Country	27-07148 Release #03642	Eligibility 8/12/99	Hearing postponed as of 11/9/99.
Helena	Allen's Oil Bulk Plant	25-01025 Release #02893	Eligibility 11/29/99	Case was stayed on 1/21/00.
Butte	Shamrock Motors	47-08592 Release #03650	Eligibility 10/1/99	Case on hold pending notification to Hearing Officer.
Whitefish	Rocky Mountain Transportation	15-01371 Release #03809	Eligibility 9/11/01	Ongoing discovery. No hearing date set.
Lakeside	Lakeside Exxon	15-13487 Release #03955	Eligibility 11/6/01	In discovery stage.
Helena	Noon's #438	25-03918 Release # 03980	Eligibility 2/19/02	Case stayed.
Wolf Point	Isle Oil Co	43-08893 Release #2552	3 claim adjustments 12/21/02	Hearing stayed.
Belt	Mary Catherine Castner	07-12039	Eligibility 11/22/02	Mar 12, 2003 stayed for up to one year.
Dillon	Town Pump Dillon #1	01-08695 Release #4144	Eligibility 03/07/05	Hearing examiner appointed.

Board Staff Report

Mr. Wadsworth noted that 65 eligibility applications were received during the year. 46 were eligible, 3 were ineligible, and 16 are pending. The number of claims received in fiscal year 2005 is 1512 and the number reimbursed is 1560.

Mr. Schumacher compared the number and dollar amounts of corrective plans between 2004 and 2005, noting that the staff has reviewed approximately $60,000 more of corrective action plans in the first six months of 2005 than in the first six months of 2004. He asked what is happening to generate the increase in the number and cost of work plans.

Mr. Wadsworth indicated that there have been quite a few excavations this year, driving the cost of plans higher, but that number of work plans varies from year to year. He is watching to see if there is a trend that may indicate a future problem.

Petroleum Release Section Report

Mr. Trombetta presented the PRS Report. He stated that 33 releases have been discovered so far this calendar year. He noted that many of the releases from above ground storage tanks.

Mr. Schumacher asked what PRS means by "resolved".

Mr. Trombetta said the Department also uses the term "closed" and it means the owner or operator has received a No Further Action letter (NFA letter). An NFA letter means that the site is clean and is often used by banks in determining loan risk. Closed sites can occasionally be reopened if new information is received, but the recently closed sites are less likely to be reopened.

Mr. Schumacher asked how many of the 1613 Active Releases are actually being worked on.

Mr. Trombetta indicated that about two-thirds of those sites are being worked on and the remainder are low priority sites.

Public Forum

Mr. Wadsworth said the Board staff has been involved in discussions with the City of Havre and their contractors, where a utility upgrade project is occurring along the Highway 2 corridor, concerning cost allocation for contamination found in the right-of-way. There are various eligible and ineligible sites there. There have been discussions concerning the issues of contaminated soils and groundwater contamination. The utilities will go in below the groundwater table, which will require water to be treated and disposed. He will inform the Board about the cost allocation strategy being developed. The staff will issue a letter to site owners in Havre so they are aware of the project and may address the Board, if they wish, concerning the cost allocation strategy in September. It is anticipated that the groundwater costs will be allocated at the end of the project, while soil remediation costs will be handled as the project moves forward.

Mr. Wadsworth asked if the members were interested in adding a new member orientation to the September meeting, since there are or will soon be several new members. Mr. Noble had suggested the idea. The Board members agreed that it would be a valuable effort. Mr. Wadsworth will include some time in the next meeting.

The next scheduled Board meeting is September 12, 2005.

Meeting adjourned at 1:28 p.m.

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Presiding Officer